



Board of Governors Meeting

Public Session Materials Late Materials

**September 28-29, 2017
WSBA Conference Center
Seattle, Washington**

WASHINGTON STATE BAR ASSOCIATION

MEMO

To: Board of Governors

From: Eileen Farley, Chair, Council on Public Defense ("CPD")

Date: September 25, 2017

Re: Performance Guidelines for Juvenile Offense Representation

FIRST READING: Recommend to the Supreme Court that the Court add the *Performance Guidelines for Juvenile Offense Representation* to Standard 14.1 "Qualifications of Attorneys", which now requires attorneys providing defense services shall be familiar with the *Performance Guidelines for Criminal Defense Representation*.

What is Being Requested?

At its July 21, 2017 the WSBA Council on Public Defense ("CPD") unanimously adopted a resolution to send the Board of Governors the *Performance Guidelines for Juvenile Offense Representation*. After advisement regarding the Board's process, the CPD voted on September 22, 2017, to ask the Board of Governors to submit the Guidelines to the Supreme Court with a recommendation that the Court include them in the Standards for Indigent Defense. Such a recommendation would be consistent with the Board's 2012 recommendation that the adult *Performance Guidelines for Criminal Defense Representation* be included in the Standards. The judicial officers present at the September 22 meeting abstained from this vote or were absent.

The CPD's request will be on the Board's agenda for a "first reading" at the September 2017 meeting. Current CPD members will attend the meeting and be prepared to present information about the proposed *Guidelines* and answer questions.

Why is the Council on Public Defense Making this Request?

On July 10, 2014, then-Chief Justice Barbara Madsen advised the CPD that the Washington Supreme Court had discussed the need for performance guidelines for attorneys representing juveniles in offender cases. Justice Madsen asked the CPD "...to develop a proposal for guidelines for consideration by the Washington State Bar Association Board of Governors." See Letter from Chief Justice Madsen to CPD Chair Jacqueline McMurtrie, dated July 10, 2014. On May 4, 2017, in response to an email from CPD emeritus member Professor Robert Boruchowitz advising the Supreme Court that work on the proposed *Guidelines* was almost completed, Chief Justice Mary Fairhurst thanked the CPD for its work and looked forward to receiving the proposed *Guidelines* and report.

In response to Justice Madsen's initial request the CPD devoted a great deal of time and effort to the development of performance guidelines appropriate to Washington State. Draft *Guidelines* were presented to the full CPD in March 2015. After discussion over a series of meetings, the CPD voted to send the *Guidelines* back to the committee for refinement. Over the next two years the committee met frequently to improve the proposed *Guidelines*.

The revised *Guidelines* draw upon Guidelines developed by the National Juvenile Defense Center. In addition, before asking the Board of Governors to approve the *Guidelines*, the CPD asked the Washington Defender Association, the Washington Association for Criminal Defense Lawyers, the WSBA Criminal Law section, WSBA Juvenile Law section, the Minority and Justice Commission, the Gender and Justice Commission, TeamChild, Northwest Immigrant Rights Project, the Youth Law Task Force, directors of public defense agencies, attorneys who contract with the Washington State Office of Public Defense to represent juveniles in offender matters, and the Washington Association of Counties to comment on the guidelines. All comments were provided to the full CPD. Copies of comments the CPD received are attached.

The attached *Guidelines* were discussed at the June and July 2017 CPD meetings. At its July 21, 2017, meeting the CPD voted unanimously to send the Board of Governors the *Performance Guidelines for Juvenile Offense Representation*, as amended during the July meeting. At its September 22, 2017, meeting the CPD then voted to ask the Board of Governors to also submit the Guidelines to the Court for inclusion in the *Standards for Indigent Defense* consistent with the Board of Governors previous recommendation that the Standards include the adult *Performance Guidelines for Criminal Defense Representation*.

The proposed Guidelines before the Board of Governors are the result of significant work by the CPD. We look forward to presenting the proposed Guidelines at the September Board meeting.



Washington State Bar Association

PERFORMANCE GUIDELINES FOR JUVENILE OFFENSE REPRESENTATION

[Date]

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PREFACE

These *Performance Guidelines for Juvenile Offense Representation* are intended to be used as a guide to professional conduct and performance. These guidelines are specific to representation of juveniles in criminal cases.

Attorneys should consider these *Performance Guidelines for Juvenile Offense Representation* in conjunction with the Washington State Bar Association *Performance Guidelines for Criminal Defense Representation*, approved June 3, 2011. Attorneys appointed by the court in juvenile criminal proceedings also shall comply with Juvenile Criminal Rule (JuCR) 9.2 and the Washington Supreme Court's *Standards for Indigent Defense*.

These Guidelines emphasize the unique demands placed upon counsel when representing and communicating with young clients and the need to use developmentally appropriate language. Counsel should be aware of, and use, listening and speaking skills that address developmental and other age-related factors necessary to facilitate effective communication with juvenile clients.

As stated in the U.S. Department of Justice's Statement of Interest, filed March 13, 2015 in *N.P., et al. vs. The State of Georgia, et al.*, Superior Court of Fulton County No. 2014-CV-241025, at page 11:

"Indeed, the unique qualities of youth demand special training, experience and skill for their advocates. For example, although the need to develop an attorney-client relationship is the same whether an attorney is representing an adult or a child, the juvenile defense advocate's approach to developing the necessary trust-based relationship differs when the client is a child.

'Because the client in juvenile court is a minor, counsel's representation is more expansive than that of a criminal defense lawyer for an adult. Lawyers for children must be aware of their clients' individual and family histories, their schooling, developmental disabilities, mental and physical health, and the client's status in their communities in order to assess their capacities to proceed and to assist in their representation. Once those capacities are understood, the lawyer must vigorously defend the juvenile against the charges with that capacity in mind, and then prepare arguments to obtain rehabilitative treatment should the child be found guilty.'" [footnote omitted].

Guiding Principles

These Guidelines draw upon the 2012 *National Juvenile Defense Standards*, developed by the National Juvenile Defender Center and Models for Change. As with those standards, the Guiding Principles for these guidelines acknowledge juvenile defense as a specialized practice requiring specialized skills, that juvenile court is an adversarial forum, and that juvenile court adjudication carries with it serious, direct and long-term consequences.

1. Juvenile defenders play a critical role in the fair administration of justice for children;
2. Juvenile defense is a specialized practice anchored in juvenile-specific training and practice skills;
3. Juvenile defense requires zealous advocacy;¹
4. Juvenile defense requires competence and proficiency in court rules and the law;
5. Juvenile defense requires legal representation that is individualized;
6. Juvenile defense requires developmentally appropriate communication with the client;
7. Juvenile defense is based on the clients' expressed interests;
8. Juvenile defense requires that clients be meaningful participants in their defense;
9. Juvenile defense requires counseling clients through the legal process with attention to both direct and indirect consequences;
10. Juvenile defense requires ensuring that clients and their families are treated with dignity and respect and that there is decorum in the courtroom;
11. Juvenile defense requires identifying and challenging barriers and deficiencies that impair juvenile defenders' abilities to provide high-quality representation; and
12. Juvenile defense requires identifying and challenging systemic barriers and deficiencies that lead to disproportionate involvement of vulnerable, underserved populations in the juvenile criminal system.

The object of these guidelines is to identify the courses of action that may be necessary, advisable, or appropriate, and thereby to assist the attorney in deciding upon the particular actions to be taken in a case to ensure that the client receives the best representation possible.

The steps taken should be tailored to the requirements of a particular case. The guidelines recognize that representation in criminal and juvenile offender cases is a difficult and complex responsibility. Attorneys must have the flexibility to choose a strategy and course of action that competently and diligently pursue the objectives of representation.

¹ As used in these Guidelines, "zealous" refers to the active exercise of skill, hard work, judgment and dedication necessary to understand the individual client's case and vigorously, effectively and professionally protect the client's rights and advocate for his/her interests.

As used in these Guidelines, “must” and “shall” are intended to describe mandatory requirements.

“Should” is not mandatory but is used when providing guidance about what attorneys can and are encouraged to do in the interest of providing quality representation.

In addition to the duties described in the *Performance Guidelines for Criminal Defense Representation (2011 Guidelines)* approved June 3, 2011 by the Washington State Bar Association Board of Governors, counsel representing juvenile clients should use these *Performance Guidelines for Juvenile Offense Representation (Juvenile Guidelines)* as a guide to professional conduct and performance.

Guideline 1. Juvenile Defense Counsel’s Role Is to Provide Quality Representation to Clients at All Stages of the Juvenile Criminal Process

1.1 The paramount obligation of defense counsel is to provide conscientious, diligent, and quality representation to their clients at all stages of the juvenile criminal process.

This requires special training in issues unique to juveniles and the active exercise of skill, knowledge, hard work, judgment and dedication necessary to understand the individual juvenile client and case. Further, this requires counsel vigorously, effectively and professionally to protect the client’s rights and advocate for his/her interests. Counsel should litigate the client’s case vigorously and challenge the state’s ability to prove its case beyond a reasonable doubt. Attorneys also have an obligation to abide by ethical requirements and act in accordance with the rules of the court.

- (a) Counsel shall not substitute his or her own view of the client’s best interests for those expressed by the client;
- (b) Where counsel believes that the client’s directions will not achieve the best long-term outcome for the client, counsel shall provide the client with additional information to help the client understand the potential outcomes and offer an opportunity to reconsider; and
- (c) If the client is not persuaded, counsel shall continue to act in accordance with the client’s expressed interests regarding the objectives of representation.

1.2 Obligation Regarding Adequate Resources for Effective Assistance

- (a) Effective representation in a juvenile case often requires access to professionals with training in social work, educational advocacy, and other disciplines relevant to juveniles;
- (b) Counsel shall advocate for resources necessary to provide effective, high-quality representation, including legal, investigative, social work, expert witness, and educational resources;

- (c) Counsel shall not accept new cases and should consider moving to withdraw from existing cases when lack of resources prevents him or her from providing quality representation; and
- (d) Counsel shall make a record if counsel is not able to provide quality representation to the client. This may include documentation of limited or denied access to clients in custody and late or denied discovery. Counsel should consider seeking interlocutory appellate review and assistance from *amicus* counsel.

1.3 Scope of Representation

- (a) In addition to the duties outlined in the *2011 Guidelines*, counsel shall consult with the client and provide representation at the earliest stage possible;
- (b) Counsel shall be clear with the client what the scope of representation will be.
- (c) Counsel should maintain continuous representation in all phases of the adjudication process, including, arraignment, pre-trial detention hearings, discovery, trial, pleas, and disposition, unless qualified counsel is available to provide representation at arraignment and pre-trial detention hearings. Ideally, to provide continuity of representation the same lawyer should represent the client from arraignment through disposition and any restitution, modification, and probation violation hearings. If local practice does not provide for that continuity of representation for appointed counsel, counsel at the outset of the representation should seek to clarify the scope of appointment and to assure that counsel's work will be appropriately compensated. In cases in which counsel is appointed, the attorney's work must be accurately and completely accounted for in complying with caseload limits. As contemplated by the Washington Court Rules CrR 3.1, CrRLJ 3.1 and JuCR 9.2 *Standards for Indigent Defense*, attorney time required for arraignment and pre-trial detention hearings and for post-disposition hearings must be accounted for in determining attorney caseload limits;
- (d) If possible, when the client is facing an ancillary proceeding that coincides with the offender charge, such as dependency, status offenses, school discipline and re-entry, and driver license suspension hearings, the lawyer should assist the client in obtaining the services of social workers, educational advocates such as TeamChild or other qualified individuals if the client does not already have such assistance and coordinate with the provision of such services. If the client has counsel or other representative in such a proceeding, the lawyer should consult and coordinate with that representative; and
- (e) When possible, counsel should represent a client at post-disposition hearings and institutional disciplinary hearings.

1.4 Explain Client Confidences and Confidential Information

- (a) Counsel shall explain that the client's privileged conversations with counsel are protected from disclosure to anyone, including the client's parent, the prosecutor,

and the court. Counsel shall also explain that the attorney-client privilege may be deemed waived if anyone else, including a parent, is present during a conversation between the client and counsel, unless a parent-child communication falls within the exceptions of RCW 5.60.060;

- (b) Counsel shall be familiar with local case law, statutes, and codes of professional conduct regarding disclosure of privileged attorney-client conversations, as well as information that may embarrass or be harmful to the client. Counsel has a duty to keep all client communications, as well as information arising out of the representation, confidential;
- (c) Counsel shall discuss with the client what personal or privileged information the attorney is authorized to share with others, such as parents or probation counselors;
- (d) Counsel shall zealously protect confidential information from public disclosure. Counsel should not discuss the case or any confidential information when people other than the client are present and able to hear. Counsel shall not knowingly use a confidence or secret of the client unless the client provides informed consent or does so as required by rules of professional conduct; and
- (e) Counsel shall exercise discretion in revealing the contents of psychiatric, psychological, medical, social, and educational reports that bear on the client's history or condition. Counsel shall not disclose data or conclusions contained in such reports unless the client provides informed consent or release is impliedly authorized in order to carry out the representation, and even then, only if doing so will advance the client's stated objectives. Prior to requesting reports from outside institutions (e.g., educational reports), counsel shall obtain informed consent from the client.

Guideline 2. Quality Representation Requires Effective, Developmentally-Appropriate Communication with Juvenile Clients and Specialized Training and Experience

2.1 Effective Communication with Juvenile Clients

In addition to the duties in *2011 Guidelines* 1.4 (b), counsel shall:

- (a) Make sufficient time available with the client to ensure communication is effective and the client fully understands the communication, and enlist the help of appropriate experts and interpreters and other third parties when necessary;
- (b) Work to ensure that differences between the client and attorney, such as maturity, disabilities, literacy, culture and language, do not inhibit attorney-client communication or counsel's ability to ascertain and effectively discuss the client's expressed interests; and
- (c) Communicate in an age appropriate and developmentally appropriate manner.

2.2 Counsel shall be knowledgeable about, and utilize, current statutes, case law, rules of procedure, rules of evidence, and rules of appellate procedure that affect juvenile practice.

- (a) Counsel shall be knowledgeable about a juvenile's right to counsel, determination of indigency, waiver of counsel, right to effective representation of counsel, and other issues specific to representation of juveniles, such as shackling of juveniles and conditions of confinement;
- (b) Counsel should be knowledgeable about the key aspects of developmental science and other research, such as discussed in *Roper v. Simmons*, 543 U.S. 551 (2005), and *Miller v. Alabama*, 567 U. S. 460, (2012), that inform specific legal questions regarding capacities in legal proceedings, amenability to treatment, and culpability;
- (c) Counsel should be familiar with and consider the implications of research specific to juveniles, including, but not limited to, brain development, language and literacy development, and the impact of adverse childhood experiences ("ACEs") [as identified by the Centers for Disease Control and Prevention, <http://www.cdc.gov/violenceprevention/acestudy/index.html>] and the manner in which those experiences are assimilated by the youth;
- (d) Counsel should be knowledgeable about the effects of trauma and sexual assault on their clients.
- (e) Counsel should be knowledgeable about any risk assessment tools used by the court, probation officers, and prosecutors;
- (f) Counsel should be knowledgeable about issues related to special education;
- (g) Counsel should be knowledgeable about the specialized skill of communicating with young clients in a developmentally appropriate and effective manner;
- (h) Counsel should be knowledgeable about the consequences of juvenile adjudication;
- (i) Counsel should be knowledgeable about the educational and social services protections and resources that are available to youth that are not available to adults; and
- (j) Counsel should be knowledgeable about where racial disparities exist in the juvenile justice system, how racial bias affects youth of color, and how racial bias can affect counsel's practice.

2.3 Use of Supporting and Consulting Resources

- (a) If the lawyer does not have enough experience or training to provide effective representation alone in a case or type of cases, the lawyer shall undertake to obtain guidance from a more experienced attorney and/or seek more experienced co-counsel, and "brainstorm" the work, to be able to provide effective representation.

The lawyer should seek funding for that assistance if it is not immediately available in the lawyer's office;

- (b) Counsel should seek opportunities to consult regularly with other lawyers representing juvenile clients and seek support from colleagues and appropriate organizations;
- (c) Counsel should seek support from colleagues and appropriate organizations when systemic barriers interfere or conflict with counsel's duties to clients; and
- (d) Counsel should seek evaluative feedback from more experienced counsel if it is not provided in counsel's own office.

Guideline 3. Quality Representation Requires That Juvenile Defense Counsel Protect Clients in Need of Special Protection

3.1 Obligation Representing Non-Citizen Clients

Counsel shall identify whether the client is a U.S. citizen. When the client is a non-citizen, counsel shall identify the client's immigration status and history and consult with available resources such as the Washington Defender Association's Immigration Project. This consultation should also include discussion of avenues for undocumented clients to obtain lawful status. If the client may be Special Immigrant Juvenile Status (SIJ Status) eligible, counsel should, where possible, assist the client to obtain available immigration legal resources to pursue an SIJ Status application.

Counsel shall advise the client about possible adverse immigration consequences and, unless otherwise advised by the client, shall advocate for a resolution to the charges that avoids adverse immigration consequences and preserves avenues to obtain lawful status.

3.2 Obligation Regarding Shackling of Juveniles

Counsel should challenge the indiscriminate shackling of clients in the courtroom or in any location that affects communication with the client or unlawful shackling of the client during labor.

3.3 Obligation Regarding Solitary Confinement of Juveniles

In consultation with clients, counsel should challenge the solitary confinement of clients.

3.4 Obligation to Protect Clients' Right Against Self Incrimination

Counsel should seek to protect clients' right against self-incrimination. This includes advising clients about their right to remain silent, notifying the detention facility that an incarcerated client has a lawyer, and seeking to prevent law enforcement from interrogating an in-custody juvenile before the juvenile has consulted with an attorney.

3.5 Obligation of Counsel Regarding Disparate Treatment of Clients

Counsel should be informed about racial disproportionality in the juvenile justice system and affirmatively represent the client to prevent adverse consequences of institutional bias. Counsel should identify when other personal factors presented by a client, such as gender identity and/or sexual orientation, risk triggering institutional and/or individual biases and affirmatively represent the client to prevent adverse consequences associated with them. Counsel should consider using empirical data to advocate for clients in detention hearings, motion practice, trial, and sentencing and any other hearings.

Counsel should also be aware of their personal and implicit biases and the potential impact these may have on the representation and the discharge of ethical duties to the client.

3.6 Obligation of Counsel to Investigate and Address Custodial Mistreatment

If counsel learns that the client has experienced abuse or misconduct by law enforcement, detention officials, or other persons in a custodial facility, counsel, with the client's consent, should document and take appropriate steps to stop the mistreatment of the client, including informing the facility and seeking release or transfer of the client.

3.7 Capacity of Youth

Counsel shall be versed in the rules, statutes, and case law governing juvenile capacity to commit a crime, including in particular age-related presumptions of incapacity. Counsel shall become familiar with experts qualified to assess capacity and learn the mechanisms for requesting an evaluation. Counsel shall learn the procedures for a capacity hearing in his or her jurisdiction and fully comprehend the ramifications if the client is found to have capacity.

3.8 Competence of Youth

- (a) In addition to the duty prescribed by Rules of Professional Conduct (RPC) 1.2 (Scope of Representation and Allocation of Authority Between Lawyer and Client) and 1.14 (Client with Diminished Capacity), counsel shall learn to recognize when a client's ability to participate in his or her own defense may be compromised due to developmental immaturity, mental health disorders, or developmental/intellectual disabilities;
- (b) Counsel shall be versed in the rules, statutes, and case law governing juvenile competence to stand trial in the jurisdiction. Counsel shall become familiar with experts qualified to assess competence to stand trial and learn the mechanisms for requesting an evaluation. Counsel shall learn the procedures for a competence hearing in his or her jurisdiction and fully comprehend the ramifications if the client is found incompetent to stand trial;
- (c) Counsel shall assess whether the client's level of functioning limits his or her ability to communicate effectively with counsel, as well as his or her ability to have a factual and rational understanding of the proceedings. When counsel has reason to doubt the client's competence to stand trial, counsel shall gather additional

information and consider filing a pre-trial motion requesting a hearing for competence determination. Counsel should consult with the client's family when possible; and

- (d) If counsel decides to proceed with a competency hearing, counsel shall secure a qualified, independent expert to evaluate the client's competence. Counsel shall then advise the client about the evaluation and proceedings, analyze the results of the evaluation, prepare the expert for testimony, and prepare his or her case substantively and procedurally for the hearing. Counsel shall advise the client about the content of the hearing and assist the client in navigating the complexities of the proceedings.

Guideline 4. Each Stage of the Juvenile Criminal Process Requires Diligence, Skill, and Effective, Developmentally Appropriate Client Communication

4.1 Formal and Informal Discovery

Counsel has a duty to pursue, as soon as practicable, discovery as provided by JuCR 1.4 and CrR 4.7 and to pursue such informal discovery methods as may be available to supplement the factual investigation of the case. In considering discovery requests, counsel should take into account that such requests may trigger reciprocal discovery obligations.

4.2 Initial Client Contact

- (a) In addition to the duties in *2011 Guidelines* 1.4 and 2.2, counsel shall explain and discuss, in developmentally appropriate language, the role of both the client and counsel;
- (b) Early Contact. Counsel shall make contact with the client at the earliest possible time, even prior to formal appointment, when possible. Counsel for a detained client shall visit the client in detention and ensure that the meeting occurs in a setting that allows for a confidential conversation. If the client is in custody, contact should be within 24 hours of appointment and shall be within no more than 48 hours, unless there is an unavoidable extenuating circumstance. Counsel should send a representative to see the in-custody client within 24 hours if counsel is not able to see the client within 24 hours; and
- (c) The initial interview should be in person in a private, legally privileged setting, e.g., away from the client's parents or others. Counsel should explain and maintain the attorney-client privilege and assure that the client knows the communication is confidential.
- (d) During the first meeting with the client, counsel shall discuss, in developmentally appropriate language:
 - (i) How the client can contact counsel;

- (ii) The attorney-client relationship, including confidentiality;
 - (iii) The objectives of the representation; and
 - (iv) The expected court schedule.
- (e) In addition to bail information for adults discussed in the *2011 Guidelines* 2.2 and 2.3, counsel at the initial meeting should seek to obtain information about:
 - (i) The client's ties to the community, family relationships, employment record and history, school record and history;
 - (ii) The client's age;
 - (iii) The client's residence, physical and mental health, child welfare status, and school status;
 - (iv) Information regarding the client's needs for immediate medical or mental health care;
 - (v) The client's citizenship status;
 - (vi) The need for signed releases for information from the client's school, medical, and psychological service providers and if possible obtain them;
 - (vii) Contact information for the client's closest family or caretaker; and
 - (viii) Any previous arrests and experience the client has had in juvenile court.
- (f) If appropriate, during the initial meeting counsel may discuss with the client:
 - (i) The conduct alleged in the police report and charging documents, including potential evidence or witnesses;
 - (ii) The legal criteria, options, and conditions the court may set for pre-trial release;
 - (iii) Diversion, detention, and placement options; and
 - (iv) The next procedural steps.
- (g) At an early stage of the representation, counsel shall discuss, in developmentally appropriate language:
 - (i) The role of parents in the proceedings and how counsel will interact with them;
 - (ii) The elements of each charged offense and the potential dispositions for such offenses;

- (iii) The roles of each juvenile court stakeholder; and
- (iv) The consequences of a finding of guilt including enhancement of future sentencing for subsequent juvenile and adult offenses.

4.3 Obtaining Further Information from the Client

Unless the information is obtained during the first meeting with the client, counsel shall promptly attempt to obtain from the client, outside the presence of any third party including the client's parent, and in a legally privileged setting:

- (a) Circumstances of any police interrogations, searches, seizures, and identification procedures;
- (b) Information about how the client was treated while in custody of the police, other investigative agencies, mental health departments, or the prosecution;
- (c) Names, addresses, phone numbers, or any other information about witnesses who may be relevant to suppression hearings, the fact-finding hearing, or disposition; and
- (d) Information about the client's prior contact(s) with the system, including the nature of any relationships with a probation officer.

Unless the information is obtained during the first meeting with the client, counsel shall at an early stage of the representation obtain the client's account of the incident.

4.4 Maintain Regular Contact with the Client

Counsel shall maintain regular contact with the client. Because of the unique characteristics of youth, the attorney should seek out the client rather than expect the client to initiate communication. If a youth is in custody, counsel shall visit on a regular basis. If a client is out of custody, counsel shall arrange phone contacts and face-to-face meetings as appropriate before future court hearings. Regardless of the client's custodial status, counsel shall provide the client with a phone number at which counsel can be reached.

Counsel shall promptly respond to telephone calls and other types of communications from the client, ideally within one business day. At every stage of the proceeding, counsel shall work to provide the client with complete information concerning all aspects of the case.

4.5 Parents and Other Interested Third Parties

Counsel shall inform the client and third parties that he or she is required to maintain confidentiality even when third parties are providing services to the client.

Counsel shall not substitute a parent's or third party's interests or view of the client's best interests for those expressed by the client, even if a parent or third party is paying for the representation. In

addition to the duties outlined in *2011 Guideline 1.3(b)*, counsel shall not serve as both defense counsel and *guardian ad litem* for the same child.

- (a) Counsel shall know state case law, statutes, and codes of professional conduct regarding all disclosures to third parties;
- (b) Counsel shall explain to the client the need to share information with third parties, and specify the information to be shared, the purpose of sharing it, and the possible consequences. Counsel shall obtain authorization, express or implied as permitted by RPC 1.6, from the client prior to communicating information to third parties; and
- (c) Counsel should allow clients to consult with family members before making critical decisions about their case. When a third party, including a parent, is trying to direct the representation of the client, counsel should inform that person of counsel's legal obligation to represent only the expressed interests of the client. In the event of a disagreement, counsel is required to abide exclusively by the wishes of the client.

4.6 Early Stages

a. Pre-Charge Representation of the Client

When representing a client prior to his or her initial hearing is possible, counsel shall protect the client's interests by:

- (i) Protecting the client from making incriminating statements or acting against the client's own interests, including advising the client, in developmentally appropriate language, about the right to counsel and the right to remain silent; and
- (ii) Advocating for the client's release under conditions most favorable and acceptable to the client.

b. Protect the Client's Interests During Police Identification and Investigative Procedures

- (i) Counsel shall be familiar with all laws and local rules regarding availability of counsel during police identification and investigative procedures;
- (ii) Counsel should consider challenging any statements made in an in-custody interrogation when the client has not consulted with counsel;
- (iii) Counsel should consider challenging any evidence obtained from the client when the client is in custody;
- (iv) In addition to the duties in *2011 Guideline 3.3*, when counsel is able, he or she should seek to be present at all phases of the identification proceedings to act as the client's advocate;

- (v) Counsel should advocate for notification of and attendance at police interrogation, identification and other investigative procedures involving the client, including when the police explain identification or other investigative procedures to the client;
- (vi) Counsel should seek to meet with the client in a legally privileged setting and advise the client on how to behave during the investigative processes;
- (vii) After a lineup, counsel, with an investigator if possible, should attempt to speak to any witness to the identification process as soon thereafter as possible; and
- (viii) Counsel should advocate for recording of any police interviews with the client.

4.7 Prosecution Requests for Non-Testimonial Evidence

Counsel shall be familiar with the law governing the prosecution's power to require a defendant to provide non-testimonial evidence (such as handwriting exemplars and physical specimens), the circumstances in which a defendant may refuse to do so, the extent to which counsel may participate in the proceedings, and the record of the proceedings required to be maintained. Counsel shall challenge probable cause as appropriate prior to the prosecution's obtaining of non-testimonial evidence.

4.8 Role of Counsel in Advising on Diversion

When counsel is representing a client who may be offered diversion, counsel shall assess, in light of discovery and the diversion program requirements, how to advise the client whether to answer questions about alleged offenses. Counsel should obtain a copy of the diversion agreement to be able to review it and to be able to advise the client about it.

4.9 Role of Counsel at Arraignment, Probable Cause Hearings and Detention Hearings

In addition to the duties in *2011 Guidelines* 2.3 and 3, and Juvenile Court Rule 1.6, counsel, when representing a client at arraignment, probable cause hearings and detention hearings, shall preserve the client's options until appropriate investigation, diversion, consultation and research can be completed.

- (a) Counsel shall advise the client, using developmentally appropriate language, of the importance of not waiving the right to representation and all other client rights;
- (b) Counsel should confirm that all hearings are recorded as required by JuCR 10.2;
- (c) As required by JuCR 7.3, at the probable cause hearing, counsel shall require the state to meet its burden of showing through a signed affidavit or live testimony that there is basis of knowledge for believing the account of a reliable informant that the act charged was committed and establish that the client committed the alleged offense;

- (d) Counsel shall seek immediate release of a detained client if doing so is consistent with the client's expressed interests. Counsel shall advocate for the removal of all physical restraints. Counsel should present the court with alternatives to detention and a pre-trial release plan;
- (e) Counsel shall request and review any detention risk assessment, checking for inaccuracies or mitigating factors that may affect the accuracy of risk scores assigned to the client; and
- (f) Counsel shall raise any factors, such as medical, psychological, or educational needs that may be adversely affected by detention, if the client permits their disclosure.

4.10 Prepare Client and Parent for Probation Interviews

- (a) Counsel shall advise the client, using developmentally appropriate language, that anything the client says to the probation officer may be shared with the court. Counsel should prepare the client for any interview with a probation officer; and
- (b) Counsel should advise the client to be respectful at the interview and not to discuss the alleged incident. Counsel should similarly prepare the client's parents and request they express their willingness to support the youth.

4.11 Review of Detention Decisions

Counsel shall consider seeking review, as the case progresses, of court decisions to detain the client. Review may consist of motions to reconsider, motions for revision of adverse decisions by a court commissioner, and motions for discretionary review in an appellate court. When appropriate, counsel shall file motions to reconsider the level of detention while a revision or an interlocutory appellate review is pending.

When all other remedies have been exhausted, counsel may consider filing a writ to challenge the client's imprisonment or detention at any relevant point during the proceeding.

4.12 Investigation, Pretrial Motions and Pleas

a. Investigate Facts of the Case

In addition to the duties in *2011 Guideline 4*, JuCR 9.2 (d), and *State v. A.N.J.*, 168 Wn.2d 91 (2010), counsel, using developmentally appropriate language, shall discuss with the client a prompt, thorough and independent investigation.

b. Develop a Theory of the Case

Counsel must have a thorough understanding of the elements of each alleged offense, as well as the affirmative or general defenses to each.

During investigation and trial preparation, counsel should develop and continually reassess a theory of the case, even if the case is on track to end in a plea.

c. Interview Defense and State Witnesses

Counsel presumptively should interview all known state witnesses and any other relevant witnesses the investigation or discovery may reveal. As part of the obligation to investigate the client's case, counsel shall consider whether to interview all witnesses named by the client. If new evidence is revealed in the course of interviewing witnesses, counsel shall attempt to locate and assess the value of the new evidence.

- (i) Counsel shall be familiar with state statutes, case law, and the code of professional conduct regarding the conducting and recording of interviews. Counsel shall be familiar with reciprocal discovery rules.
- (ii) Counsel shall attempt to confirm the availability of every known witness.
- (iii) Counsel should investigate factors that may affect witnesses' capacity for observation.
- (iv) Counsel shall document all efforts to locate and speak with witnesses, as well as information gathered from such interviews.
- (v) Counsel should conduct interviews with an investigator present to avoid the possibility of being required to withdraw from the case should impeachment testimony about the interview be needed.

d. Obtain the Client's Social History

- (i) Counsel shall be familiar with rules and procedures for obtaining and using information about the client, including the use of release forms and subpoenas.
- (ii) Counsel should investigate the client's social history. This includes acquiring documentation and interviewing persons with information relevant to the client's background, character, and any special education status, learning disability, and adverse childhood experiences, including physical and mental trauma and sexual assault.
- (iii) Counsel should seek records concerning the client's mental health, involvement with the child welfare system, educational background and/or intellectual abilities, as well as documents detailing school achievement and discipline, positive community or extracurricular activities, employment, and prior police and court involvement.

e. Pre-Trial Motion Practice

In addition to the duties in *2011 Guideline 5*, counsel should make all colorable motions. Motions should be made in writing.

f. Alternative Resolutions

- (i) Counsel shall be knowledgeable about entry requirements, the operation, and the benefits and risks of alternative resolution programs in the jurisdiction.
- (ii) Counsel shall advise the client about alternatives in developmentally appropriate language and the consequences of any statements or agreement required for entry into the alternative program.
- (iii) Counsel shall be informed about juvenile records which may be created by the client's participation in any non-adjudicatory solution. Counsel must advise the client of any issues related to immigration, driver licensing, sex offender registration, ownership of firearms, and possible enhancement of any future sentencing for subsequent juvenile and adult offenses.
- (iv) Counsel should advise the client that there may be other possible consequences including licensing, housing, education, and government benefits, that can be affected by an alternative resolution. When possible, counsel should refer the client to other resources to assist with these possible consequences.
- (v) When consistent with the client's expressed interest, counsel should advocate for diversion, informal resolution, or referrals outside of the traditional court process.

g. Plea Negotiations

- (i) Counsel shall communicate every plea offer to the client.
- (ii) During plea negotiations, counsel shall zealously represent the expressed interests of the client, including advocating for some benefit for the client in exchange for the plea.
- (iii) Counsel shall protect the client's right to be provided adequate time to consider the plea and alternative options.
- (iv) Counsel shall communicate with the client to identify the consequences of a conviction that are most important to the client. In addition to the duties in *2011 Guideline 6*, counsel shall explain, in developmentally appropriate language, the strengths and weaknesses of the prosecution's case, the benefits and consequences of accepting a plea agreement, and any rights the client may be forfeiting by pleading guilty. Counsel shall work to help the client make an informed decision about whether to accept a plea offer.
- (v) Counsel should seek in any plea negotiations to address the consequences that matter to the client.

- (vi) Counsel must advise the client of any issues related to immigration, driver licensing, sex offender registration, ownership of firearms, and possible enhancement of any future sentencing for subsequent juvenile and adult offenses.
- (vii) Counsel should advise the client that there may be other possible consequences including licensing, housing, education, and government benefits, that can be affected by a guilty plea. When possible, counsel should refer the client to other resources to assist with these possible consequences.
- (viii) Counsel should attempt to effect a resolution that minimizes or avoids these consequences.

h. Obligations When the Client Decides to Accept a Plea Offer

In addition to the duties in *2011 Guidelines* 6.3 and 6.4, counsel is obliged to ensure that the client's acceptance of the plea is voluntary and knowing, and reflects an intelligent understanding of the plea, including the rights the client forfeits by pleading guilty.

- (i) Counsel shall explain to the client, in developmentally appropriate language, the process for making an admission or plea, the questions the court will ask in the colloquy, and the rights that the client will forfeit. Counsel shall also inform the client that, notwithstanding the client's decision to accept the plea, the court may reject the plea agreement if the court disagrees with the terms of the plea or determines the waiver of rights has not been knowing, intelligent, and voluntary. Counsel shall explain the consequences of the court's rejection.
- (ii) If, during the plea colloquy, it becomes clear that the client does not understand the colloquy, counsel shall request a recess or a continuance to assist the client. When the client makes a plea or admission, counsel shall ensure that the full content and conditions of the plea agreement are placed on the record.
- (iii) If the client may be taken into custody after the plea, counsel shall prepare the client and be prepared to offer an appropriate alternative to the court.

i. Obligations Regarding Revision, Interlocutory or Collateral Review, Writs, and Stays

Counsel should strategically pursue motions for revision from commissioner decisions and interlocutory appeals and collateral reviews of rulings adverse to the client. Counsel should request a stay when appropriate.

4.13 Adjudicatory (Fact-finding) Hearing

a. Prepare Client for Adjudicatory Hearing

In addition to the duties in *2011 Guideline 7*, counsel shall, prior to the adjudicatory hearing, communicate to the client, in developmentally appropriate language, what is expected to happen before, during, and after the hearing. Counsel should provide the client with clear instructions regarding appropriate courtroom attire and conduct.

b. Adjudicatory Hearing

As of this publication date, Washington State juvenile trials are bench trials, with the judge playing a dual role as the finder of fact and the interpreter of law. RCW 13.04.021. Counsel should consider moving for a jury trial and challenging the denial of juries. In the event juries are provided, counsel needs to be familiar with preparing for and conducting jury trials.

Counsel shall always be conscious that all information in pre-trial hearings and pleadings may adversely influence the judge. When pre-trial information has potentially biased a judge's view of the client's culpability sufficient to interfere with the client's due process rights, counsel may consider moving for the judge's recusal.

The duties to prepare, present the defense case, including opening and closing statements, and all other duties in *2011 Guideline 7*, other than those relating to the selection of a jury and jury instructions, apply to bench trials in juvenile court proceedings.

c. Client's Testimony

- (i) The decision to testify rests with the client. Counsel shall communicate, in developmentally appropriate language, the advantages and disadvantages of testifying, including the risk of self-incrimination and the effect in other proceedings.
- (ii) Counsel shall be familiar with state law regarding examination of the client, including whether it permits the use of prior juvenile adjudications to impeach the client.

d. Request of Specific Findings of Fact and Conclusions of Law

Counsel shall make a clear record for appeal. Counsel should consider proposing findings of fact and conclusions of law and/or making objections to findings and conclusions proposed by the prosecutor, and should ensure that any proposals and objections are included in the record.

4.14 Disposition

a. Role of Counsel at Disposition

In addition to the duties in *2011 Guideline 8*, counsel shall advise the client, in developmentally appropriate language, about disposition sentencing guidelines, potential out of home placement

options, including group homes, foster care, residential programs and treatment facilities. Counsel should visit programs and facilities to be able effectively to advise a client or advocate on the client's behalf.

Counsel shall be aware of the different assessment tools and other evaluative instruments used to inform dispositions. Counsel shall be prepared to challenge the validity and reliability of risk assessment tools, both facially and as applied to the client, where appropriate. Counsel shall understand the mechanics of such instruments and keep abreast of challenges to their application to the client. If appropriate, counsel should use expert witnesses to challenge the use of, validity of, and conclusions drawn from risk assessments and/or other evaluative instruments for disposition decisions.

b. Role of Counsel When Preparing Client for the Disposition Process

- (i) Counsel shall advise the client, in developmentally appropriate language, about the disposition process, the dispositions the court will consider, and the consequences of failure to comply with a disposition order.
- (ii) Counsel shall explain to the client what likely will happen in interviews with probation officers developing a social history report, as well as psychological or other evaluative testing ordered by the court or requested by counsel. Counsel should attend court-ordered predisposition interviews.
- (iii) Counsel shall be familiar with and explain in developmentally appropriate language the use of evaluation instruments and tests.
- (iv) Counsel shall advise the client about standard disposition conditions the court is likely to impose and challenge their imposition if they are unrelated to the offense or the client's needs;
- (v) Counsel shall inform the client of his or her right to speak at the disposition hearing, the potential benefits and detriments of doing so, and the proper decorum and behavior for such hearings; and
- (vi) Counsel shall confer, when appropriate, with the client's parents to explain the disposition process and inquire about the parents' willingness to support the client's proposed disposition.

c. Role of Counsel in Advocating for a Disposition Plan

- (i) Counsel shall only recommend a disposition to the court with the client's consent.
- (ii) Counsel shall request an advance copy of any written disposition memorandum submitted by the prosecution or probation department and verify that the information presented is accurate.

- (iii) Counsel should submit an independent written memorandum describing factors in the client's life that address the judge's anticipated concerns and point out how the defense plan contributes to the client's rehabilitation. The memorandum should highlight the client's strengths and establish the circumstances under which the client is most likely to succeed.
- (iv) Counsel shall submit any evidence in support of the defense's proposed disposition plan, including recommendations from a social worker when appropriate.
- (v) Counsel shall confirm that the client has received credit for time served.
- (vi) Counsel should address the appropriateness of any court-ordered educational, vocational, and rehabilitative services, as well as the location and duration of the services, the place of confinement if any, eligibility for aftercare/parole if appropriate, requirements for evaluations or treatment, and/or assignment to drug rehabilitation.
- (vii) Counsel shall advocate, consistent with the client's wishes, that any court-ordered services are provided in the least restrictive setting.

d. Counsel's Obligation to Review Court Ordered Disposition Plan and the Consequences of Disposition with the Client

- (i) Counsel shall carefully review the disposition order to make sure that it contains all the provisions of the disposition plan and that it accurately reflects the court's verbal order. Counsel shall verify that it properly records detention credits, plea agreements, opportunities for restitution hearings, and information that may favorably affect the client.
- (ii) Counsel shall review the written order with the client, in developmentally appropriate language, and advise him or her of the nature, conditions, obligations, duration, and consequences of the disposition. When the client agrees, counsel should seek to inform the client's parent of the disposition conditions, obligations, duration, and consequences of the disposition.
- (iii) Counsel shall notify the client of the right to move for revision of a commissioner's ruling when that is available and of the right to appeal. Counsel should seek a timely revision or pursue an appeal, with permission from the client, if the order fails to meet the state's obligation to provide for educational and special needs.
- (iv) Counsel shall seek information about the requirements of any program or service ordered and explain to the client what the programs require.
- (v) Counsel shall be aware of statutes and case law regarding the disclosure of the client's record and the legal mechanisms available to limit or foreclose distribution of the client's arrest and court records. Counsel shall advise the

client on the timing and procedure for moving to limit disclosures where disclosure is not automatically prohibited.

e. Obligations to a Client Awaiting Placement

- (i) Counsel should pursue efforts to keep the client in the least restrictive environment prior to placement in a treatment setting.
- (ii) Counsel should be prepared to advocate for the client who is being held in secure confinement while awaiting placement; and if the placement does not occur as ordered, counsel should move for the client's release. If counsel does not prevail, counsel shall seek provision of interim services for the client's educational, physical, mental health, and other needs.

4.15 Post Disposition Matters

a. Trial Counsel's Obligations Regarding Appeals

- (i) In addition to the duties in *2011 Guideline 9.2*, counsel shall advise the client, in developmentally appropriate language, of the right to appeal and the process of the appeal. Trial counsel shall explain to the client the consequences of any decision to waive the right to appeal.
- (ii) When the client chooses to appeal, trial counsel shall file a notice of appeal and preserve the client's right to appeal, including presenting a motion to proceed in *forma pauperis*. Trial counsel shall assist the client in obtaining appellate representation.
- (iii) Trial counsel shall be familiar with and follow rules for obtaining a stay of the disposition order pending appellate review. Trial counsel shall discuss with the client whether to seek a stay and shall request one should the client desire a stay.
- (iv) When the client at the time of disposition is unable to decide whether to appeal, trial counsel shall make clear to the client the deadline for filing the appeal, seek a decision from the client in time to meet the deadline, and be prepared to file the appeal should the client decide to file the appeal.
- (v) To preserve issues for appeal, counsel should consider proposing findings of fact and conclusions of law and/or making objections to findings and conclusions proposed by the prosecutor or entered by the court, and should ensure that counsel's proposed findings, conclusions, and objections are included in the record.
- (vi) As of publication date of these guidelines, juveniles cannot be assessed costs of appeal. Counsel should verify that this remains true and explain to the client that there will be no costs for the appeal unless this has changed. The decision regarding whether to appeal belongs to the client.

b. Obligations of Trial Counsel to Appellate Attorney

Trial counsel should be available to appellate counsel to answer questions and issues regarding the appeal and to provide documents as requested by the appellate counsel to the extent authorized by the client.

c. Role of Counsel to Clarify Scope of Any Post Disposition Representation

Counsel shall be clear with the client what the scope of post-disposition representation will be, if any. When possible and when the client requests, counsel should assist the client in efforts to ensure that the client is receiving the services ordered by the court.

d. Role of Counsel in Addressing Possible Post-Disposition Challenges

While the client is a juvenile, counsel should help the client to obtain representation on issues raised by the client that relate to the validity of the conviction and could lead to a motion to set aside the conviction or a *habeas corpus* petition or a personal restraint petition, as well as issues relating to the safety of the client or conditions of the client's confinement.

e. Role of Counsel at Post-Disposition Trial Court Hearings

Ideally, the same lawyer should represent the client from arraignment through disposition and any modification and probation violation hearings. To provide continuity of representation, counsel should represent the client in restitution and modification and probation violation hearings. See Guideline 1.3 (b).

f. Representation at Restitution, Review and Modification Hearings

- (i) Counsel shall be knowledgeable about current applicable cases and statutes regarding restitution, modification, and probation.
- (ii) Counsel shall provide the same level of zealous representation at restitution, review and modification hearings as counsel would provide for any other proceeding.
- (iii) Counsel shall explore the factual basis of the client's alleged failure to abide by conditions of the court's order, including whether the probation officer and designated social service providers have met their obligations to the client.
- (iv) Counsel should be prepared to challenge the client's alleged failure to abide by the court's order in an evidentiary hearing.
- (v) When counsel's investigation reveals that the client's probation officer, service providers, or others subject to the court's order have not complied with the court's order, counsel should either request the court enforce its existing order or propose appropriate modification to the order.

- (vi) Counsel shall explore and offer any available mitigation to explain the client's failure to abide by the order.

g. Sealing Juvenile Records

Counsel shall be familiar with the laws governing the sealing of the client's record and the agencies and organizations permitted by statute to have access to the client's arrest and court records. Counsel shall advise the client of processes and resources for sealing juvenile records. If requested, counsel should assist the client with this process whenever possible.

Guideline 5. Juveniles Facing Adult Prosecution Require Counsel With Special Training and Expertise

5.1 Prosecution of Client as an Adult, Specialized Training and Experience Necessary

- (a) Counsel shall be knowledgeable about statutes and case law governing the decline of a juvenile to adult court for prosecution, including presumptions in favor of or against keeping youth in juvenile court and the burden of proof necessary to overcome such presumptions. Counsel shall be aware of the timing and process of transfer hearings and required findings for decline of jurisdiction to adult court. In jurisdictions in which the attorney handling the decline hearing will also represent the client at any adult court proceedings, counsel shall be familiar with adult criminal court rules, sentencing guidelines, and rules of evidence
- (b) Counsel shall be familiar with the extent to which adult facilities provide juvenile clients legally mandated safety protections, medical and mental health care, rehabilitative treatment, and mandatory education services, and advocate for the client to receive appropriate services;
- (c) Counsel shall pursue specialized training, including in the areas of child and adolescent development, to ensure the requisite level of knowledge and skill to represent a client in a decline hearing or in adult court, and be familiar with developmental issues that may affect competence to stand trial;
- (d) Unless counsel has been sole or lead counsel in a previous decline case, counsel shall be supervised by or consult with an attorney who has experience representing juveniles in decline hearings; and
- (e) Counsel representing a client facing a possible life sentence should be familiar with current resources regarding representation of a juvenile client facing a possible life sentence, including lawyers who are experienced in representing such clients and the expert witnesses available.

5.2 Obligation of Counsel to Inform the Client of the Possibility of Adult Prosecution and Potential Consequences

- (a) Counsel shall advise a client, using developmentally appropriate language, about the procedures that may lead to adult prosecution; and

- (b) Counsel shall explain to the client or, if counsel does not have experience with adult felony practice, ask an attorney who has such experience to explain to the client, the consequences of prosecution in adult court, including possible sentences, likelihood of deportation if the client is not a citizen, and direct and indirect consequences.

5.3 Obligation to Investigate Factors Relating to Possible Adult Prosecution

- (a) Counsel shall conduct a timely and thorough investigation of the allegations and the client's background;
- (b) Counsel shall assess what factors weigh for and against decline to adult court and shall investigate the case accordingly; and
- (c) Counsel shall promptly compile and coordinate all evidence and information bearing on the decline decision, including mitigation information such as educational and mental health and developmental history, case law and research regarding adolescent development.

5.4 Duty to Advocate for Client's Expressed Interest Regarding Decline

- (a) After consultation with the client, counsel shall develop cogent arguments that support the client's expressed interests;
- (b) Counsel shall advocate for the client's expressed interests regarding jurisdiction to prosecutors and probation officers. This obligation applies both when a decline proceeding is possible in juvenile court and when counsel is able to advocate for the client before the prosecutor has made a decision about direct filing in adult court when direct filing is possible;
- (c) When the client seeks to remain in juvenile court, counsel's pleadings during the decline proceeding shall specify with particularity the grounds for opposing adult prosecution, including, but not limited to:
 - (i) the nature of the offense;
 - (ii) the prosecutor's failure to establish probable cause;
 - (iii) the client's amenability to rehabilitation in the juvenile system;
 - (iv) information concerning adolescent development as it relates to the client;
 - (v) the client's incompetence to proceed in adult court; and
 - (vi) other criteria established by case law and statute.
- (d) If the prosecutor ultimately files charges that could lead to adult prosecution, and the client has sought to remain in juvenile court, counsel should advocate to the

prosecutor either to amend the charge to one that would permit proceeding in juvenile court or to waive application of exclusive adult criminal jurisdiction and to seek the court's approval of that waiver;

- (e) Counsel shall obtain and review any report developed by the probation officer prior to the hearing;
- (f) Counsel shall consider use of expert witnesses to address issues such as the client's capacity to proceed in adult court, amenability to rehabilitation in juvenile court, and related developmental issues;
- (g) At the hearing, counsel shall:
 - (i) Challenge any defect in the charges that would deprive the adult court of jurisdiction;
 - (ii) Raise any credible facial or "as applied" state or federal constitutional challenges to adult prosecution; and
 - (iii) Present all facts, mitigating evidence, and testimony that may convince the court to keep the client in juvenile court, such as the client's amenability to treatment, amenability to rehabilitation in juvenile court and related developmental issues, the availability of tailored treatment options in juvenile court, and immigration and significant direct and indirect consequences.

5.5 Preserve the Client's Opportunity to Appeal a Judicial Decision to Prosecute in Adult Court

- (a) Counsel shall confirm that all hearings are recorded. Counsel shall adequately preserve the record for appeal;
- (b) Counsel shall apprise the client, in a timely manner and using developmentally appropriate language, of the opportunity and procedures to appeal a judicial decision to prosecute the client in adult court;
- (c) Counsel shall comply with Guideline 4.15 above, concerning advising the client and perfecting appellate rights. Counsel shall adhere to statutory requirements for the timing and/or perfecting of the appeal of the judicial decision to prosecute the client in adult court. When appropriate, counsel should move for interlocutory appeal of the judicial decision in a timely manner to reduce the length of time a detained client spends incarcerated and to avoid the removal of the client to an adult jail; and
- (d) Counsel shall consider proposing findings of fact and conclusions of law and/or making objections to findings and conclusions proposed by the prosecutor or entered by the court, and shall ensure that counsel's proposed findings, conclusions, and objections are included in the record.

5.6 Obligations Following a Determination to Prosecute the Client in Adult Court

- (a) Upon determination that the client will be prosecuted in adult court, counsel, consistent with the client's expressed interests, shall zealously oppose placement of the client in adult jail or detention. Counsel shall be aware of and raise the risks associated with incarcerating young people among adults, and advocate for alternative placements in the juvenile justice system and/or release of the client on personal recognizance or on bail;
- (b) If the case is transferred to adult court and the client is assigned a different lawyer, counsel should work closely with the new attorney to ensure a smooth transition of the case; and
- (c) When a client is tried in adult court, in addition to complying with the *2011 Guidelines*, counsel should use child developmental research and case law supporting the lessened culpability of adolescent offenders in arguing intent, capacity, and the appropriateness of rehabilitative sentencing options and use appropriate expert witnesses.

Guideline 6. Special Obligations of Counsel Representing Juveniles on Appeal

- a. Representing juveniles on appeal presents many of the same concerns as at fact-finding, such as the need to employ developmentally-appropriate language with juvenile clients and to recognize that counsel's legal obligation is to represent only the expressed interests of the client.
- b. Because juvenile jurisdiction is not necessarily extended by filing an appeal, Counsel shall determine whether and when the client has turned 18, and if jurisdiction can no longer be extended, be aware of what issues could expose the client to adult prosecution.
- c. Counsel shall address juvenile appeals as quickly as possible, and when appropriate under the rules, seek accelerated review.

Guideline 7. Public Defense Counsel Have Special Responsibilities to Improve the Juvenile Criminal Justice System.

7.1 Role of Counsel in Systemic Issues

- (a) Public defense counsel who have a significant juvenile court practice are in a unique position to identify and challenge any harmful or unlawful conditions and systemic issues adversely affecting both their clients and other juveniles, particularly, but not limited to, issues involving the right to counsel, the right to effective assistance of

counsel, the unlawful shackling of juveniles in court, and harmful or unlawful conditions of confinement; and

- (b) In addition to representation of individual clients, attorneys who have a significant juvenile court practice should consider advocating to change practices or orders that abridge or threaten to abridge the constitutional, statutory, or court rule rights of juveniles appearing in the courts in which they practice. Compare, *Vovos v. Grant*, 87 Wn.2d 697, 700-01, 555 P.2d 1343, 1345-46 (1976).

7.2 Sharing Information and Developing Alliances

When counsel becomes aware of systemic concerns affecting issues such as right to counsel, harmful or unlawful conditions of confinement of juveniles, or shackling, counsel should consider sharing information and developing alliances with bar associations, prosecutors, law enforcement, judges, community groups, and others to correct those conditions.

The Supreme Court
State of Washington

BARBARA A. MADSEN
CHIEF JUSTICE
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July 10, 2014

Jacqueline McMurtrie, Chair
Washington State Bar Association
Council on Public Defense
1325 Fourth Avenue, Suite 600
Seattle, WA 98101-2539

Dear Ms. McMurtrie:

The Washington Supreme Court has discussed the recommendation coming from the National Center for State Court Western Region Juvenile Reform Summit, regarding the need to develop public defense performance guidelines for juvenile offender cases and would like the Counsel on Public Defense (CPD) to develop a proposal for guidelines for consideration by the Washington State Bar Association Board of Governors.

Members of the court who attended the summit were impressed by the presentation on juvenile offender defense standards prepared by the National Juvenile Defender Center. Because the CPD has already developed Performance Guidelines for Criminal Defense Representation in conjunction with the Indigent Defense Standards, we think the CPD is well-positioned to advance a similar document that can guide public defense attorneys who handle juvenile offender matters. The court believes that defense performance guidelines specific to juvenile offender cases will improve both the training of new defenders and courtroom performance of current defenders.

Please let me know if you have any questions or concerns about the court's request.

Sincerely,

Barbara A. Madsen
Chief Justice

c: Justices
George Yeannakis, TeamChild
Joanne Moore, Director, Office of Pub. Defense
Callie Dietz, Administrator, Admin. Office of Courts

From: "Fairhurst, Justice Mary" <Mary.Fairhurst@courts.wa.gov>
Date: May 4, 2017 at 9:49:16 AM PDT
To: "'Boruchowitz, Robert'" <boruchor@seattleu.edu>
Cc: Eileen Farley <Eileen.Farley@nwaj.org>, Diana Singleton <dianas@wsba.org>, Rodrigues Daryl A <Daryl@Rodrigues.us>, SUP DL - JUSTICES <SUPDL-Justices@courts.wa.gov>, SUP DL - ADMINISTRATIVE ASSISTANTS <ADMINISTRATIVEASSISTANTS@courts.wa.gov>
Subject: RE: Juvenile Performance Guidelines

Bob, Thank you for the update and for the dedication and hard work by you and your committee. The court looks forward to receiving your report when it is ready for presentation to us. I am cc'ing the justices and their assistants so they too are apprised of the status. Thanks. Mary

Mary E. Fairhurst
Chief Justice
360 357-2053
Mary.fairhurst@courts.wa.gov

From: Boruchowitz, Robert [<mailto:boruchor@seattleu.edu>]
Sent: Thursday, May 4, 2017 9:19 AM
To: Fairhurst, Justice Mary <Mary.Fairhurst@courts.wa.gov>
Cc: Gordon McCloud, Justice Sheryl <J_S.GordonMcCloud@courts.wa.gov>; Eileen Farley <Eileen.Farley@nwaj.org>; Diana Singleton <dianas@wsba.org>; Rodrigues Daryl A <Daryl@Rodrigues.us>
Subject: Juvenile Performance Guidelines

Dear Chief Justice Fairhurst:

I am writing to report on the progress of the Council on Public Defense regarding developing proposed Juvenile Performance Guidelines as requested by former Chief Justice Madsen.

Our Standards Committee has been meeting frequently and we have completed a draft that we plan to refine and send to stakeholders for comment later this month. As chair of the committee, my plan is to present the draft to the full CPD at the June meeting for discussion. I anticipate that the CPD will want to have two meetings to discuss the Guidelines before voting on sending them to the WSBA Board of Governors for approval. My hope is that the BOG would approve them in August or September and forward them to the Court at that time for your consideration.

While it has taken much longer than I had hoped or anticipated to complete this project, we have resolved a number of issues on which there were differing opinions, and I believe we will have a strong document to present first to the BOG and then to the Court.

Please let me know if you have questions. Thank you for your consideration.

Sincerely,
Bob Boruchowitz

Feedback on Draft Juvenile Guidelines

Juvenile Guidelines Feedback

Updated 12/6/16

Overall

Juliana Roe (Washington State Association of Counties): In your letter to our office, you point out that your office worked on developing and establishing the standards for indigent defense services that were eventually adopted by the Supreme Court. In creating and adopting these standards without providing a funding source to support them, you increased county costs for indigent defense services by 50%. Criminal justice costs make up 73% of county general fund expenses, of which indigent defense costs are included. If you choose to address juvenile matters in the same manner, the Washington State Association of Counties (WSAC) asks that you include funding for such services. Otherwise, WSAC will oppose the adoption of these guidelines.

Kathleen Kyle (Defenders): I am the Managing Director at the Snohomish County Public Defender Association (SCPDA). I join in Eileen Farley's Memorandum to the Council on Public Defense regarding concerns related to scope of representation and challenges to systemic issues. SCPDA attorneys are often encouraged to follow their assessment about the scope of work required in an individual case and/or work on systemic change. However, these actions cannot be at the expense of the essential functions outlined in the job description. I agree to Ms. Farley that creating additional obligations undercuts the caseload standards. To a large degree, I agree with Bob Boruchowitz's memorandum. To the extent that the guidelines could support these actions without mandating them on individual public defenders, it may be helpful to have the guidelines validate that these functions are very related to improving case outcomes.

Guideline 1

None

Guideline 2

Jeri Chavez (Skagit County Public Defender) Re 2.4: 2.4(d) indicates: "If counsel decides to proceed with a competency hearing, counsel must secure a qualified, independent expert to evaluate the client's competence." I understand the intent, to strongly encourage defense experts, but I think this sentence is going too far in removing the professional judgment of the attorney.

I had a case where the expert from Child Study and Treatment indicated that my client was not competent and not restorable due to developmental delays. I had collateral witnesses and documents to support this (IEP, teachers, family, medical doctor, reports from children's hospital). The expert from CSTC was not my independent expert, but they were saying everything I could hope an independent

expert would say. Yet under this standard, I must still retain an independent expert to confirm the expert from CSTC? Even though my client was in custody and doing so would have delayed his hearing.

This seems contrary to the guiding principles, which include: "The steps actually taken should be tailored to the requirements of a particular case. The guidelines recognize that representation in criminal and juvenile offender cases is a difficult and complex responsibility. Attorneys must have the flexibility to choose a strategy and course of action that competently and diligently pursue the objectives of representation." It seems it might be more appropriate to say, If counsel decides to proceed with a competency hearing, counsel must secure a qualified, independent expert to evaluate the client's competence "if counsel is not in agreement with the Court's expert."

As these rules are being finalized, the drafters should be careful not to take away the ability of the attorney to use independent judgment to decide what is best in each case, in consultation with the client. Every case and every client is unique.

Guideline 3

None

Guideline 4

None

Guideline 5

None

Guideline 6

None

Guideline 7

None

Guideline 8

None

Guideline 9

Paula Plummer (atty) Re 9.1: Our payment in Skagit is by the hour (\$65/hr) and in San Juan, per hearing (\$345). There is no compensation authorized for training or advocacy for/by conflict attorneys. I have been a conflict attorney or pro bono since the early 1990's, and I do participate in training and system/community advocacy, but lack of compensation is a big barrier to effectiveness.

Paula Plummer (atty) Re 9.2, 9.3, and 9.4: see above (no 9.3 in the undated proposed guidelines I received)

Guideline 9 - Scope, Duration, and Representation

Jeri Chavez (Skagit County Public Defender) Re Scope and Duration: My response for duration and scope are combined.

I have a concern regarding scope and duration. I am a fulltime public defender in Skagit County. I am a county employee. I do not carry my own malpractice insurance. I am only insured to do work within the scope of my county duties. I do not have an objection to the WSBA making a requirement that my job duties as a juvenile public defender are expanded in scope and duration. If it were a requirement, if shall was the language used, then that additional work would be part of my county job duties, and would be covered by the counties insurance. My concern is, when additional work is suggested, such as the following language used in the guidelines, "when possible," "should help," and "should assist." Without a directive, a shall, or a must, it is unclear if this work is within the scope of my duties as a county employee, and therefore unclear if I am practicing without malpractice insurance. For public defenders who hold contracts or who work for nonprofits, this may not be a concern. But for a fulltime county employee, it raises an issue.

I also share Ms. Farley's concern that writing the standards in a way that is merely aspirational makes them powerless. But, I do not necessarily think that means the concept of enlarged scope and duration of representation should be deleted. The language should be cleaned up, making expanded scope and duration of representation mandatory in certain circumstances.

For example, in reference to 1.6, the language could be clarified to indicate the obligation to investigate and ensure the client's safety is to a current client who is currently or recently in the facility or still under the authority of the person or person who committed the harm. As with other court rules, comments could be added. This would create a mandatory duty to ensure the safety of a client currently or recently in detention, but not to investigate past misconduct alleged against an officer a year ago, that is irrelevant to the current case or the client's current safety.

I support and would encourage the WSBA to enlarge the scope and duration of a juvenile attorney's representation, but urge the bar to make the expansion clear, and mandatory.

My concern is not unjustified. I have assisted a former client in attempting to seal a case (in an adult proceeding). In response to my action, the prosecutor's office did indicate that they believed I was acting outside the scope of my duties, and may contact the civil prosecutor and/or HR due to my actions. County public defenders should not be working in fear of negative employment action due to upholding these standards.

Another reason to have clear, understandable language, is that people other than attorneys will be interpreting it. I do not decide who I represent. Clients go to an independent office, Assigned Counsel,

and request an attorney. If juveniles will be entitled to attorneys at county expense in some post-conviction circumstances, this needs to be clear to Assigned Counsel so that they make the referral, rather than sending the client away based on the belief that they are not entitled to an attorney on the post-conviction matter. If the language is left as “should,” “when possible,” and “may,” then juveniles in different counties will receive disparate treatment. Based on these standards, some counties may allow assigned counsel to appoint attorneys on post-conviction matters, while other counties may direct that such appointments not be made.

One last point to keep in mind, is that the further scope and duration are expanded, the further the caseload limits need to be reduced proportionately to allow compliance with the standards.

Jeri Chavez (Skagit County Public Defender) Re obligation to challenge systemic Issues: In regard to addressing systemic change, I have the same concerns regarding my liability as a county employee working outside the scope of my duties. I am a fulltime public defender in Skagit County. I am a county employee. I do not carry my own malpractice insurance. I am only insured to do work within the scope of my county duties. I would like to see explicitly authority for a county public defender to raise systemic issues within the scope of their representation. Ms. Farley indicates: “I do not believe the WSBA should or can, tell an attorney that he or she cannot speak on an issue. Just as strongly, I believe the WSBA should not and cannot tell an attorney he or she must speak about an issue.” By not explicitly giving juvenile public defenders authority to raise systemic issues in the standards, our respective counties could tell us that we cannot speak on these issues; that it is not within the scope of our county employment. The case cited may provide standing, but again, if that is outside the scope of my job duties, I am practicing without insurance. If the standards explicitly state that it is within a public defender’s job duties to raise systemic issues when appropriate under their professional judgment, in consultation with their client, then all the standards are doing is allowing us to speak on an issue. I believe it is still up to the attorney, and the client, to decide when this is appropriate. Authority is not a requirement. CrR 3.6 (in conjunction with the constitution) provides authority to file a motion on a search, but does not require that every attorney file a motion on every search in every case. It is still up to the attorney to use their professional judgment.

MEMO

TO: Council on Public Defense
Chair, Eileen Farley

FROM: Kim Ambrose

CC: Bob Boruchowitz

RE: Comments on Proposed Performance Guidelines for Juvenile Defense Representation

DATE: 12/8/16

First, I side with Bob Boruchowitz on the issue of including an obligation for defenders to participate in systemic change. Second, I have made some suggested changes that I think capture what we have learned from listening to youth who have been processed through the system.

I come at this from the perspective of a juvenile defender (formerly a public defender and one who continues to represent youth through the University of Washington Race and Justice Clinic). In our clinical program we have represented youth at first appearance and post-adjudication or conviction through personal restraint petitions, clemency petitions, motions for relief from registration, motions to seal records and ISRB review hearings. My students have also regularly interacted with incarcerated youth through detention workshops and focus groups at JRA.

My greatest concern is how juvenile defenders have been complicit in a system that systematically incarcerates and labels youth of color at outrageously disproportionate rates. The chasm that I see that exists between defenders and their clients and their families/communities is huge and I think that the guidelines present a unique opportunity to begin to think about how defenders can own their part and do a better job at addressing it.

I am especially concerned in the way that we view our role as defenders in relationship to clients' families and communities. A common theme we hear from youth is that their defense attorneys are often indistinguishable from a justice system that is stacked against them and their families. Historically we have emphasized that defenders need to listen to their clients and not their parents, for good reason. But, I think the unintended consequence has been that many defenders do not listen to clients' families and marginalize them to their clients' detriment. This contributes to the persistent oppression of youth and families of color.

My comments are below.

Preface -- ADDITION AT END

In addition, the juvenile criminal justice system has, since its inception, disproportionately adjudicated and incarcerated youth of color. Juvenile defenders, as the legal representatives of children in that system, play a critical role in protecting their clients from injustice in their individual cases as well as injustice inflicted by the system and its institutions.

Guiding Principles 11 & 12

I strongly support guiding principles that recognize that a juvenile defender is uniquely situated to identify and address the systemic problems that affect their clients.

Rationale: If defenders don't raise and challenge barriers to their ability to provide high quality representation – who will? Will young clients on their own? Their families? Will they be heard? With respect to Principle 12, I would assert that failing to identify and challenge systemic barriers results in complicity with and perpetration of an oppressive system.

Guiding Principles – ADDITION

Juvenile defense requires an understanding of clients' relationships to their family, schools and communities.

Rationale: One of the key differences between juvenile and adult clients, besides their brain development, is their position in society. Children exist in relationship and subordinate to their parents or guardians and schools that control most aspects of their lives. They are not autonomous. Although they are entitled to autonomy and agency in the attorney-client relationship, they are not the same as adult actors. This is what makes juvenile defense so challenging. I propose adding this to the guiding principles to acknowledge this unique aspect of juvenile defense. Juvenile defenders, who frequently come from different communities and cultures than their clients, must take affirmative steps to understand their clients' communities.

1.3 Obligation to Avoid Conflicts of Interest with Parents or Guardian

Delete “counsel should not permit the parent to direct the representation.”

Add in comment section: **“Counsel should allow clients the opportunity to consult with family members before making critical decisions about their case, including whether to plead guilty.”**

Rationale: This rule generally is necessary to ensure that juvenile defenders understand that their client is the youth, not the youth's parent. In some communities, defenders may listen to parents

and not their clients because parents demand it or it is easier to take direction from them. However, the opposite is also true. Some defenders assert they cannot discuss cases with a client's family and will not talk to parents even where a client would like the attorney to do so. In my experience talking with youth of color who have been adjudicated, one of their main complaints is their lawyer's unwillingness to talk to their family and include their family in advocacy efforts. They also complain that they are not given enough time to consult with family members about plea offers, etc. Removing the line that says "counsel should not permit the parent to direct the representation" does not take away from a lawyer's ethical duty under RPC 1.2 and 1.14 to follow their client's direction, but it de-emphasizes excluding parents from the process where the client will benefit from advice from a trusted family member.

2.4 Competence of Youth

- Add a section on "capacity" as well as "competency." (TBD)
- Addition in **bold**:

c. Counsel must assess whether the client's level of functioning limits his or her ability to communicate effectively with counsel, as well as his or her ability to have a factual and rational understanding of the proceedings. When counsel has reason to doubt the client's competence to stand trial, counsel must gather additional information, **including information from family members** and consider filing a pre-trial motion requesting a hearing for competence determination; and

6.9 Sealing Juvenile Records

I propose deleting "if requested" and "if possible" and add in **bold**:

Counsel must be familiar with the laws governing the sealing of the client's record, the agencies and organizations permitted by statute to have access to the client's arrest and court records, and direct and indirect consequences of arrest and court records. Counsel must advise the client of available legal processes for sealing juvenile records. ~~If requested, counsel should assist the client with this process whenever possible.~~ **Counsel should make motions to modify restitution and legal financial obligations where necessary in order to effectuate the sealing process.**

Rationale: In light of the recent changes to the sealing laws, which include an administrative sealing process when client turns 18, more is needed here. Right now, defenders are not representing their clients who are denied administrative sealing relief – they are not even showing up – and they should be requesting modifications of restitution and LFOs that can lead to the records being sealed. This will be controversial with those who assert that their duty to represent their client ends after sentencing.

Guideline 9

In order to instruct defenders further on their role to address the overrepresentation of youth of color I would add language in **bold**:

Public defense counsel who have a significant juvenile court practice are in a unique position to identify and challenge any harmful or unlawful conditions and systemic issues adversely affecting both their clients and other juveniles, particularly, but not limited to, issues involving the right to counsel, the right to effective assistance of counsel, **access to diversion programs and alternatives to secure detention, unlawful police practices, prosecutorial filing standards that have a disparate impact on youth of color**, the unlawful shackling of juveniles in court, and harmful or unlawful conditions of confinement.

Amy I. Muth
PresidentTeresa Mathis
Executive Director

December 8, 2016

TO: WSBA Council on Public Defense
Via Diana Singleton, CPD Liaison at dianas@wsba.org

FROM: Amy Muth, President

RE: Draft Performance Guidelines for Juvenile Offense Representation

The WACDL Board of Governors reviewed the proposed juvenile guidelines at our December 3 meeting. We agreed that WACDL does have several concerns — outlined below — regarding the expanded scope of representation.

1. Scope of Representation: If adopted as currently worded, the proposed standards clearly expand the traditional scope of what a public defender working in a juvenile court will be required to do — and do this without providing adequate funding for the additional work. It appears that these guidelines are not aspirational, but are in fact mandates.

Under proposed 1.7(c) the scope of representation is expanded to include ancillary proceedings such as “dependency and status offenses, school discipline and re-entry, driver license suspension hearings, [and] the lawyer should assist the client in obtaining the services of social workers, educational advocates such as team child or other qualified individuals if the client does not already have such assistance and coordinate with the provision of such services. . . .” Currently public defense offices simply do not have the resources to provide representation and training for that representation, in ancillary proceedings.

2. Caseload Limit Standards: The obligation to represent a client “when possible” in collateral matters and post representation would undercut the current juvenile caseload limit standards. The current caseload standards did not assume representation in matters outside the courtroom. Caseload standards are already predicated on the assumption that it is a full-time position. Increasing the obligation to represent juvenile clients in collateral matters beyond what was anticipated when the caseload standards were adopted will dramatically increase the time spent on any given case and thereby reduce the time available for other clients and other cases. In addition, since the needs of each juvenile client are different, it will be difficult to forecast the time and resources necessary to fulfill the increased scope of representation.
3. Funding: These standards also improperly place the burden of demanding adequate funding for the expanded scope of representation on the shoulders of

the front line public defender, rather than the courts and state legislature where it belongs. See proposed guideline 1.2, as well as proposed 1.7 which states "If local custom does not provide for that continuity of representation for appointed counsel, counsel, at the outset of the representation should seek to clarify the scope of appointment and to assure that counsel's work will be appropriately compensated."

The burden of ensuring adequate funding is not the obligation of the in-court public defender. The obligation to provide adequate funding is the exclusive purview of the legislature.

While the proposed juvenile performance guidelines — and all of the lengthy discussion that obviously went into drafting them — are to be applauded for defining what a juvenile public defender *should* be, we are concerned that expanding the obligations of representation without first providing for adequate funding is not possible under the current caseload limit standards. In addition, we are concerned that the proposed performance guidelines will require attorneys to provide representation in matters in which they have not been properly trained.

From: Michael Kawamura [mailto:mkawamu@co.pierce.wa.us]

Sent: Thursday, December 8, 2016 10:46 AM

To: Diana Singleton <dianas@wsba.org>

Cc: pthompson@snocopda.org

Subject: Request for feedback regarding proposed modifications to Performance Guidelines for Juvenile Offense Representation

Prior to providing comments regarding the issues in question, I have received the benefit of reviewing two excellent memorandum positions dated September 8, 2016, by Mr. Robert Boruchowitz and Ms. Eileen Farley. Following review of each, along with the proposed Juvenile Guidelines for Juvenile Offense Representation, it becomes evident that distinct positions exist regarding the proposed scope and duration of representation obligations for a defender appointed to represent a juvenile client.

Scope of Representation

As a defender office who annually represents thousands of indigent clients we are highly cognizant and versed in understanding the magnitude of hurdles our clients must confront in their daily lives which sometimes cause interaction with the Criminal Justice System. When those hurdles intersect into the traditional aspects of the provision of effective assistance of counsel, defenders are expected to aggressively advocate on behalf of the client. This process creates a clear delineation between mandatory indigent criminal defense services and those which although appropriate and justifiable, do not directly relate to currently recognized liberty interests upon which the use of public funds may be authorized, nor do the proposed modifications provide sufficient guidance as to where and when the scope of representation concludes. Additionally, the referenced laudable and significant additional defender responsibilities proposed are currently not resourced fiscally and in some situations lack staff expertise to perform.

Obligation to Challenge Systematic Issues

Within the scope of traditional representation parameters, appointed defenders frequently address systematic issues, case by case, client by client. This task is a full time highly demanding job based in large part on the issues which prompt the proposal at issue. To require more and establish this duty exclusively to one segment of the Justice System via WSBA Performance Standards is problematic.

I am very appreciative of the commitment to justice which the Council on Public Defense promotes as well as your request for comment on these most important of issues.

Very truly yours,

Michael Kawamura, Director

Pierce County Assigned Counsel

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(253) 798-6961

mkawamu@co.pierce.wa.us

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From: "Khandelwal, Anita" <Anita.Khandelwal@kingcounty.gov>

Date: December 9, 2016 at 12:28:00 PM PST

To: "'bonnies@wsba.org'" <bonnies@wsba.org>, "'hedman@defensenet.org'" <hedman@defensenet.org>

Subject: support for WSBA proposed guidelines and guiding principles for juvenile practice

I write on behalf of the King County Department of Public Defense in support of the aspirational language of Guideline 9 on Systemic Issues, and in support of Guiding Principles 11 and 12, which recognize the important of defense attorneys identifying systemic barriers and deficiencies. DPD and its predecessor non-profits have a deep commitment to working on systemic issues impacting children who are poor and are accused of crimes. For example, the non-profits worked with the prosecutor to develop revised guidelines for eligibility to a pre-filing diversion program (180). Initially, that program required that children enroll after responding to a letter that was mailed to them. Failure to respond resulted in filing of charges and an inability to enter 180. Defense attorneys recognized that this practice had a negative impact of poor families with high rates of mobility who might not get the letter or understand it if they did. As a result of defense intervention, the Prosecuting Attorney's Office changed its eligibility and allows children to enroll in 180 even after the filing of charges. The change did not require defense attorneys to invest significant resources, but did create a meaningful change for juvenile defendants.

Because of their youth and inability to advocate for themselves, it is particularly important that children's defense attorneys advocate for them. Nonetheless, the DPD believes that the principle that defense attorneys can and should recognize systemic problems and make efforts to remedy those problems applies for all clients.

Anita Khandelwal

Policy Director

King County Department of Public Defense

401 Fifth Ave., Suite 213

Seattle, WA 98104

From: Stone, Gail [mailto:Gail.Stone@kingcounty.gov]

Sent: Tuesday, June 13, 2017 1:22 PM

To: eileen.farley@nwaj.org

Cc: Gordon McCloud, Justice Sheryl <J_S.GordonMcCloud@courts.wa.gov>; Amburgey-Richardson, Kelley <Kelley.Amburgey-Richardson@courts.wa.gov>; Bonnie Sterken <bonnies@wsba.org>; Diana Singleton <dianas@wsba.org>

Subject: Comments to Performance Guidelines for Juvenile Offense Representation

Ms. Farley,

Attached please find comments to the Performance Guidelines for Juvenile Offense Representation the WSBA Council on Public Defense is developing. Thank you for the opportunity to provide our perspective and recommendations.

I am submitting this to the CPC on behalf of the Washington State Supreme Court's Gender & Justice Commission. The Incarcerated Women and Girls Committee, of which I am chair, conducted the review on behalf of the Commission.

The Gender & Justice Commission takes no position on the Guidelines. We limited our review and recommendations to ensuring that issues and impacts based on gender are addressed. We appreciate the CPD's work on that front and are supplementing it with our recommendations.

Gail Stone

Law & Justice Policy Advisor

King County Executive Dow Constantine

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King County

The arc of the moral universe is long, but it bends toward justice.

Rev. Dr. Martin Luther King, Jr.

Guideline 2. Quality Representation Requires Effective, Developmentally-Appropriate Communication with Juvenile Clients and Specialized Training and Experience

2.2 Counsel shall be knowledgeable about, and utilize, current statutes, case law, rules of procedure, rules of evidence, and rules of appellate procedure that affect juvenile practice.

- a. Counsel shall be knowledgeable about a juvenile's right to counsel, determination of indigency, waiver of counsel, right to effective representation of counsel, and other issues specific to representation of juveniles, such as shackling of juveniles and conditions of confinement;
- b. Counsel should be knowledgeable about the key aspects of developmental science and other research, such as discussed in *Roper v. Simmons*, 543 U.S. 551 (2005), and *Miller v. Alabama*, 567 U. S. 460 (2012), that informs specific legal questions regarding capacities in legal proceedings, amenability to treatment, and culpability;
- c. Counsel should be familiar with and consider the implications of research specific to juveniles, including, but not limited to, brain development, language and literacy development, and the impact of adverse childhood experiences (ACES) [as identified by the Centers for Disease Control and Prevention, <http://www.cdc.gov/violenceprevention/acestudy/index.html>] and the manner in which those experiences are assimilated by the youth;
- d. Counsel should be knowledgeable about any risk assessment tools used by the court, probation officers, and prosecutors;
- e. Counsel should be knowledgeable about issues related to special education;
- f. Counsel should be knowledgeable about the specialized skill of communicating with young clients in a developmentally appropriate and effective manner;
- g. Counsel should be knowledgeable about the consequences of juvenile adjudication;
- h. Counsel should be knowledgeable about the educational and social services protections and resources that are available to youth that are not available to adults; and
- i. Counsel should be knowledgeable about where racial and gender disparities exist in the juvenile justice system, how racial and gender bias affects youth of color, and how racial and gender bias can affect counsel's practice.
- j. Counsel should be knowledgeable about the effects of trauma and sexual assault on their clients.

Guideline 3. Quality Representation Requires That Juvenile Defense Counsel Protect Clients in Need of Special Protection.

3.2 Obligation Regarding Shackling of Juveniles

Counsel should challenge the indiscriminate shackling of clients in the courtroom or in any location that affects communication with the client [or unlawful shackling during labor](#).

Guideline 4. Each Stage of the Juvenile Criminal Process Requires Diligence, Skill, and Effective, Developmentally Appropriate Client Communication

4.12 Investigation, Pretrial Motions and Pleas

d. Obtain the Client's Social History

(i) Counsel shall be familiar with rules and procedures for obtaining and using information about the client, including the use of release forms and subpoenas.

(ii) Counsel should investigate the client's social history. This includes acquiring documentation and interviewing persons with information relevant to the client's background, character, and any special education status, learning disability, and adverse childhood experiences, including physical and mental trauma, [and sexual assault](#).

(iii) Counsel should seek records concerning the client's mental health, involvement with the child welfare system, educational background and/or intellectual abilities, as well as documents detailing school achievement and discipline, positive community or extracurricular activities, employment, and prior police and court involvement.

h. Obligations When the Client Decides to Accept a Plea

In addition to the duties in 2011 Guidelines 6.3 and 6.4, counsel is obliged to ensure that the client's acceptance of the plea is voluntary and knowing, and reflects an intelligent understanding of the plea, including the rights the client forfeits by pleading guilty.

(i) Counsel shall explain to the client, in developmentally appropriate [and trauma-informed](#) language, the process for making an admission or plea, the questions the court will ask in the colloquy, and the rights that the client will forfeit. Counsel shall also inform the client that, notwithstanding the client's decision to accept the plea, the court may reject the plea agreement if the court disagrees with the terms of the plea or determines the waiver of rights has not been knowing, intelligent, and voluntary. Counsel must explain the consequences of the court's rejection.

(ii) If, during the plea colloquy, it becomes clear that the client does not understand the colloquy, counsel shall request a recess or a continuance to assist the client. When the client makes a plea or admission, counsel shall ensure that the full content and conditions of the plea agreement are placed on the record.

(iii) If the client may be taken into custody after the plea, counsel shall prepare the client and be prepared to offer an appropriate alternative to the court.

From: Greg Link <greg@washapp.org>

Subject: Junenile Statndards

Date: June 14, 2017 at 9:35:43 AM PDT

To: "Boruchowitz, Robert (boruchor@seattleu.edu) (boruchor@seattleu.edu)" <boruchor@seattleu.edu>

Bob,

I looked over the proposed juveniles standards a few weeks ago and noticed they provide very little particulars for appellate representation of juveniles. Representing kids on appeal presents many of the same issues as at trial, such ensuring the attorney and kid understand the parent cannot speak for the kid and the need to communicate in a fashion appropriate for the kid. And so, the addition of a section on appellate practice could build on much of what is already addressed for other proceedings.

Appeals present additional issues as well. For one, because the jurisdiction statute does not presently allow for extension of juvenile jurisdiction by virtue of an appeal, it is critically important to know if and when the kid has turned 18, and if jurisdiction can no longer be extended to be aware of what issues could expose the kid to adult prosecution. As an example, if I raise an evidentiary claim and get the conviction reversed, if jurisdiction has already lapsed and the State elects to retry the case, retrial will be in adult court. Further, because juvenile sentences are relatively short as compared to adult sentences, it is critically important to address these appeals in an accelerated fashion. But again, I think building on the other proceedings already addressed in the proposed standards, addressing these added issues would not lead to much additional work for the CPD.

To my thinking, as these proposed standards seek to address representation of juveniles in offender proceedings they should at a minimum address all aspects of those proceedings in which the right to counsel attaches. I fear that trying to address juvenile appeals in yet to be adopted general appellate standards will prove unwieldy, as doing so would necessitate the need for appellate standards to separately address the myriad types of specialized appeal such mental health commitments, 71.09 commitments, termination of parental rights, and criminal contempt findings.

I appreciate your efforts on the CPD, and would be happy to discuss my concerns with you further.

Gregory C. Link
Washington Appellate Project
1511 Third Avenue, Suite 701
Seattle, Washington 98101
206.587.2711
www.washapp.org

From: Jana Heyd [mailto:Jana.Heyd@opd.wa.gov]

Sent: Thursday, June 15, 2017 4:10 PM

To: Bonnie Sterken <bonnies@wsba.org>

Subject: FW: Comments on the Performance Guidelines for Juvenile Offense Representation -

Hello Bonnie,

Dae Kim and I are the co-chairs of the Juvenile Law Section of the Bar. Although we did not have a chance to send out the performance guidelines (draft 2) to our entire section, Dae and I wanted to pass on our comments as co-chairs.

We fully support including proposed guidelines 11 and 12 in the "Guiding Principles" section. High quality representation is imperative for our juvenile offender clients. In order to provide that representation, it is crucial that at a minimum, the barriers and deficiencies that impair quality representation should be identified, challenged and remedied. We also support juvenile defense efforts to challenge systemic barriers that lead to disproportionate numbers of underserved youth populations in the juvenile offender system.

Thank you,

Jana Heyd and Dae Kim, Co-Chairs, Juvenile Law Section of the WSBA

Jana Heyd

Parents Representation Program Managing Attorney

Washington State Office of Public Defense

711 Capitol Way South, Suite 106

PO Box 40957

Olympia, WA 98504-0957

(360)586-3164 x 118

Jana.Heyd@opd.wa.gov

From: Dan Connolly [mailto:dan@dan-connolly.com]
Sent: Friday, June 16, 2017 8:37 AM
To: Bonnie Sterken <bonnies@wsba.org>
Cc: Melissa MacDougall <macdougallmlaw@gmail.com>
Subject: Juvenile Performance Guidelines

Good morning,

Thank you for the opportunity to review and comment. I am a juvenile defender in Okanogan County and am writing today in place of Melissa MacDougall, Okanogan County Contract Defender.

I see much emphasis on the use of "developmentally appropriate language" and I couldn't agree more with the emphasis. Other factors help as well, I find, such as toning down the typical attorney attire and making sure there is a friendly, less formal office environment. We can only do our best work when we allow the client to feel comfortable and speak freely about their lives and problems relating to the case.

Thanks again,

Dan Connolly